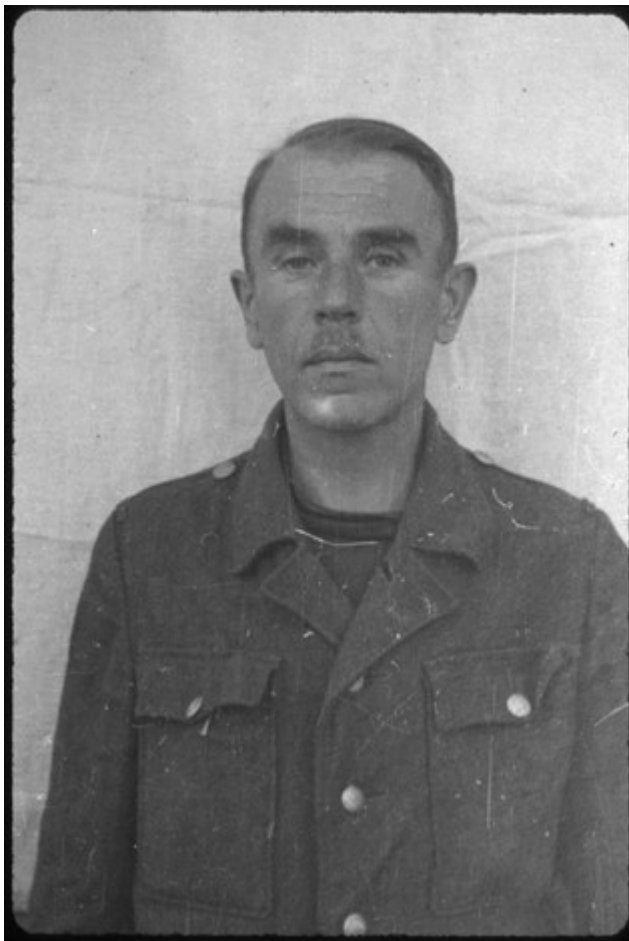


The Injustice of Conspiracy Accusations in War Crimes Trials

[Carlos Whitlock Porter](#)

In war crimes trials, “conspiracy”, “design”, and “plan”, are used sometimes synonymously, and sometimes not. The doctrine of conspiracy was borrowed from American state and lower Federal Court decisions, particularly *Marino v. US*, 91 Fed. 2d. 691, Circuit Court of Appeals. The rest of the world, of course, was not placed on notice to obey these decisions. In 1945, conspiracy was a concept unknown to international law. An example of the unfairness of this doctrine in practice is provided by the instances of Schoepp and Gretsch, two of forty defendants in in the Trial of Martin Gottfried Weiss, one of the forty defendants associated with the operation of Dachau Concentration Camp, Dachau, Nov. 15 – Dec. 13, 1945, M1175 National Archives, beginning on microfilm page 000691.



SS-Unterscharführer Albin Gretsch. In the Dachau main case Gretsch was condemned to 10 years imprisonment. Photo 1945. By Member of War Crimes Branch: Origin: Dr. Victor L. Wegard [Public domain], via Wikimedia Commons

DEFENSE: I would like to make a statement to the court relative to the defendants Schoepp and Gretsch. There has been no evidence against either of these men, either by the prosecution or by any witness for the defense. Therefore, they have nothing that they have to defend. But they ask me to say to the court

that they throw themselves on the court, if there are any questions that any member of the court would like to ask them. They have nothing to hide, and it would be up to the court to ask them any questions they might have.

PROSECUTION: May it please the court... whether or not there is any evidence before the court as to the criminality and culpability with respect to Schoepp and Gretsich, is a matter which this court has already decided, in their rulings on the motion for a directed verdict of not guilty. It may be the position of the defense counsel that there is no evidence, but I think it is grossly improper to put the court into the position of asking the accused to be put on the stand. I think it is highly improper for the defense counsel to ask the court to reveal their attitude by putting them in the position of asking the accused Schoepp and Gretsich to take the stand. I think that that is an election which should be made by the accused themselves, after they have conferred with counsel, and it is certainly improper to ask this court whether or not they have any questions that they want to ask the accused at this time.

DEFENSE: May it please the court, that isn't the point at all. These men have nothing to say on the stand, but they don't want the court to get the impression that they are refusing to take the stand, or refusing to answer any questions. They are merely throwing themselves on the court, with these words: "I have nothing to hide". There is no point in their taking the stand. I wouldn't know what to ask them. The prosecution has not brought one thing out against them. There is nothing for them to defend. But they don't want the court to get the idea they are hiding anything, and for that reason they open themselves to the request of the court. There is nothing improper about that. The burden of proof is on the prosecution to prove that these men are guilty of what they are charged with. There has been no evidence brought out against them. The prosecution takes the position that the burden is on them to prove that they are innocent.

PROSECUTION: The answer to that is that these men are charged with acting in pursuance of a common design to subject these prisoners to killings, beatings, tortures, starvation, abuses, and indignities. We have shown by our case that these men were guards, and as such they acted in pursuance of a common design to subject these people to the beatings, killings, starvation, and so forth, as charged in the particulars. I again say that it is entirely up to the accused, with the advice of their counsel, to either take the stand or remain silent, as they see fit, but to try to put this court into the position of making an election, or even attempting to disclose their opinion as to their guilt or innocence at this time, is grossly improper.

PRESIDENT: The defense will proceed with their case.

DEFENSE: Do I understand, Sir, that the court desires them to take the stand?

PRESIDENT: The court is not going to express itself one way or the other. We have already passed on your motion for a directed verdict of not guilty, at the conclusion of the prosecution's case. You can proceed with your case in any way you think best.

ALBIN GRETSCH, one of the accused, was then called to the stand by the defense as a witness in his own behalf, and testified through the interpreter as follows:

DIRECT EXAMINATION:

Questions by the defense:

Q: What is your name?

A: Albin Gretsches.

Q: How old are you?

A: Forty-six years.

Q: Where were you born?

A: Augsburg.

Q: Did you ever participate in a common design to murder or to mistreat any prisoners, or any persons?

A: No.

DEFENSE: No further questions. [!]

On cross examination, the prosecution showed that he was a guard, that he had a gun, and that there were bullets in that gun. On redirect, the defense showed that he never fired a shot. Gretsches was convicted of "aiding and abetting in a common design".

JOHANN SCHOEPP, one of the accused, was called to the stand by the defense as a witness in his own behalf, and testified through the interpreter as follows:

DIRECT EXAMINATION:

Questions by the defense:

Q: What is your name?

A: Johann Schoepp.

Q: How old are you?

A: Thirty-four and half years.

Q: Where were you born?

A: In Alcen, Rumania.

Q: Are you a Rumanian citizen?

A: Yes.

DEFENSE: No further questions. [!]

On cross examination, the prosecution showed that he was a reserve guard on a transport.

On redirect, the defense showed he had no gun, no orders, nothing to do, and was a conscript assigned to the German Army from the Rumanian Army.

He was convicted of "aiding and abetting in a common design".

EXCERPTS FROM PROSECUTION SUMMATION

(beginning on microfilm page 000857)

PROSECUTION (Lt. Col. Denson)

... The case has been long. This court has heard the oral testimony of over 170 witnesses...I would like to call the court's attention and wish to emphasize the fact that the offense with which these 40 men stand charged is not killing, beating, and torturing these prisoners but the offense is aiding, abetting, encouraging and participating in a common design to kill, to beat, to torture, and to subject these persons to starvation.

[Note that there is no mention of a gas chamber. That accusation was dropped before trial, but reintroduced into evidence at Nuremberg, even though it was known to be false. – C.P.]

It may be, because of the testimony submitted here, that this court may be inclined to determine the guilt or innocence of these forty men by the number of men they killed, or by the number of men they beat, or the number they tortured. That is not the test that is to be applied in this case... We are not trying these men for specific acts of misconduct. We are trying these men for participation in this common design... as a matter of fact, this case could have been established without showing that a single man over in that dock at any time killed a man. It would be sufficient, may it please the court, to show that there was in fact a common design, and that these individuals participated in it, and that the purpose of this common design was the killings, the beatings, and the tortures and the subjection to starvation... The evidence before this court demonstrates beyond all peradventure of a doubt the existence of this common design. It is not contended, nor is it necessary to sustain, the charges that this common design had its origin in Dachau, nor was it first conceived in January 1942. ...

[Note that the word “conspiracy” is avoided at all times, apparently to give the prosecution more leeway than allowed in conspiracy cases. It was never revealed where the “design” originated, who made it, when and where, whether it was in writing or oral, or who was present. – C.P.]

EXCERPTS FROM JUDGMENT: 13 December 1945

PRESIDENT: The evidence presented to this court convinced it beyond any doubt that the Dachau Concentration Camp subjected its inmates to killings, beatings, tortures, indignities, and starvation to an extent and to a degree that necessitates the indictment of everyone, high and low, who had anything to do with the conduct and the operation of the camp. This court reiterates that, although appointed by a conquering nation as a military government court in a conquered land, it sits in judgment under international law and under such laws of humanity and customs of human behavior that is recognized by civilized people. Many of the acts committed at Camp Dachau had clearly the sanction of the high officials of the then customs of the German government itself. It is the view of this court that when a sovereign state sets itself up above reasonably recognized and constituted law or is willing to transcend readily recognizable constituted customs of human and decent treatment of persons, the individuals effecting such policies of their state must be held responsible for their part in the violation of international law and the customs and laws of humanity.

[Note that no references are given to any provisions of any laws constituting the legality of the court, the trial, or the crimes of the defendants. – C.P.]

The accused and counsel will stand. The accused will present themselves individually in the order in which they are numbered before the bench.

Thirty-six of the forty defendants were sentenced to be hanged, two to life imprisonment, and Schoepp and Gretsch to ten years. Appeal was permitted as to sentence, but not as to the merits of the case. Twenty-eight of the defendants were actually hanged. Most of the rest were released in the 1950s.

[This article is excerpted from a forthcoming book by Carlos W. Porter, *War Crimes Trials and Other Essays*.]

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